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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GOLDIC TECHNOLOGY, INC.,

Plaintiff and Appellant,

v.

MAXMILE CORPORATION et al.,

Defendants and Respondents.

B200344

(Los Angeles County
Super. Ct. No. BC340758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Law Offices of James T. Grant, James T. Grant; Murtagh & Associates and Paul G. Murtagh for Plaintiff and Appellant.

Selman Breitman and Dennis M. Alexander for Defendants and Respondents.

Plaintiff Goldic Technology, Inc. sued its business competitor, defendant Maxmile Corporation and Maxmile's president Roger Hwang (together, Maxmile) for, among other causes of action, breach of a settlement agreement. Goldic contends Maxmile violated the agreement's prohibition against communications that "defame, libel, slander or degrade" Goldic's products in a flyer containing true but unflattering statements about Goldic's product. In a bifurcated trial on liability, specifically, on the meaning of the word "degrade" as used in the settlement agreement, the trial court rejected Goldic's argument that true statements could breach the agreement and ruled for Maxmile. Goldic appeals, contending that the trial court's interpretation was erroneous and that Goldic was denied its right to a jury trial on the factual issue of whether Maxmile's statements constituted a breach of the settlement agreement. We reject these contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Since 1989, Goldic has been in the business of selling electronic dictionaries that translate English to Chinese and Chinese to English.¹ Roger Hwang, manager and president of Maxmile, has been selling electronic dictionaries for approximately 17 years.²

In 1997, Goldic filed an action in Los Angeles County Superior Court against Maxmile and other parties not involved here. Goldic alleged that defendants made false statements about Goldic and its dictionary in certain print and radio advertisements. Goldic asserted causes of action against the defendants for libel per se, trade libel, libel,

¹ Goldic Technology, Inc. formerly did business as "Goldic Electrical, Inc." The parties stipulated for purposes of this action that Goldic Technology, Inc. is the assignee and successor-in-interest to Goldic Electrical, Inc.

² Between 2004 and 2005, a third entity, Wen Chu Shing, sometimes sold the electronic dictionaries, but was not a major competitor.

slander per se, intentional and negligent interference with prospective economic advantage, violation of the Unfair Practices Act, unfair competition, violation of the Cartwright Act, and negligence.

In early 1999, Goldic, Maxmile, Hwang, and several other defendants (not parties here) entered into a settlement agreement. The allegations of Goldic's complaint were incorporated by reference "as if set forth fully" in the agreement. Relevant to this action, the parties agreed in paragraph 4 as follows:

"(k) All parties agree to refrain from any future publications, broadcasts, advertisements or communications in the future which defame, libel, slander or degrade any of the other parties or any of the other party's products. All parties agree to refrain from participating in any activities that unfairly interfere with the other parties' business relations; and

"(l) Defendants agree to refrain from any publications, broadcasts, advertisements or communications in the future which defame, libel, slander or degrade plaintiffs or any of plaintiffs' products, or constitute a violation of any case law or any statute or code. Defendants regret that any of their prior advertisements or broadcast may have caused an inaccurate impression about the quality and place of manufacturing of plaintiffs' products and/or the financial condition of plaintiffs." The settlement agreement did not define the word "degrade."

In early 2005, Goldic introduced a new electronic dictionary, the "Yi Shen 888," which was more accurate and featured a larger, easier to read screen. Hwang created a Chinese language flyer that was distributed in Maxmile's stores.³ The flyer states at the top: "It [referring to the Yi Shen 888] Makes Mistakes in its own Example Sentences!" The flyer lists 12 examples of translation errors, then states: "Erroneous machine translation, misleading the children, misleading other people and hurting business!" At

³ Goldic's president, Joseph Su, obtained a copy of the flyer from Maxmile's store in San Gabriel.

the bottom of the flyer, it states: “Please note that the manufacturer of [the Yi Shen 888] does not guarantee the accuracy of translation, and it specifies that the manufacturer shall not be held responsible for ‘any and all disputes or legal responsibilities’ resulted [*sic*] from the result of translation!” (Emphasis in original.)

In October 2005, Goldic filed the instant action against Maxmile, Hwang, and others not involved here in Los Angeles County Superior Court. Goldic alleged causes of action for libel, slander, trade libel, breach of contract, declaratory relief, injunctive relief, intentional and negligent interference with prospective economic advantage, and unfair business practices.

In February 2006, the trial court entered an order preliminarily enjoining and restraining Maxmile “from any future publications, broadcasts, advertisements, or communications that degrade plaintiffs or any of plaintiffs’ products.” The trial court acknowledged that although Maxmile claimed that its statements about Goldic’s product were “absolutely true (a defense to defamation), the statements can reasonably be interpreted as ‘degrading’ in violation of the contract. The term ‘degrade’ is not vague, ambiguous or unclear and appears to have been mutually agreed upon.” The court found Goldic had met its burden of demonstrating a reasonable likelihood of success on the merits and that the relative balance of hardships favored granting the preliminary injunction because Maxmile would only have to cease printing and distributing flyers “that were meant to be internal anyway.” As for the alleged chilling of Maxmile’s free speech, “that right was abandoned in the settlement agreement – [Maxmile] gave up the right to degrade any of [Goldic’s] products.”

By the time of trial, breach of contract was the only remaining cause of action. With the agreement of the parties, the trial was bifurcated. The issue of interpretation of the contract was to be determined first in a bench trial.⁴

⁴ At the hearing on motions in limine, the court stated that it viewed Goldic’s motion in limine to exclude truth as a defense as a dispositive motion, saying: “the only remaining cause of action in this case is . . . for breach of contract.” The court recognized that it

Defendant Hwang testified at trial that the phrases he wrote in the flyer, notably “erroneous machine translation, “the machine will also mislead the children,” and “the machine will mislead people,” were his opinions. Plaintiff’s president, Joseph Su, testified that when he obtained the Maxmile flyer, he checked each of the alleged erroneous translations for himself. His results were the same as those Mr. Hwang listed in his flyer. Mr. Su notified his software company of the translation problems.

On February 28, 2007, the court issued its tentative decision. The court agreed with the parties that the settlement agreement was not ambiguous. The court found that in the context of the settlement agreement, the word “degrade” did not include true statements.

The court stated that the evidence established that Maxmile’s statements in the flyer about Goldic were accurate, there were really just two competitors in the “Chinese electronic dictionary business,” and that Goldic’s own ads comparing its product favorably over other competitors could be interpreted as “drawing unflattering comparisons with its competitor Maxmile” and would violate the settlement agreement under Goldic’s definition. The trial court also rejected Goldic’s argument that any other definition of degrade would render the term surplusage. Finally, the court found it “significant” that the breach of contract cause of action in the original complaint

would have to interpret the word “degrade” in order to rule on the motion in limine and stated: “[a]nd so, looking at this motion . . . in conjunction with defendant’s motion . . . to bifurcate issues of liability and damages, the court determined that it made sense to grant the motion to bifurcate and try the . . . liability portion of the trial first, as a bench trial, which would resolve the issue of the interpretation of the contract. [¶] Only then, if the court determines the issue in [Goldic’s] favor, would we go forward with the liability portion of the trial[.]” The court asked Goldic’s attorney whether he “want[ed] to say anything on the record to preserve this, or have I convinced you at this point of my position?” Goldic’s counsel responded, “Yes, your honor[.]” evidently responding to the second part of the court’s inquiry. The court’s minute order thus stated: “The Court GRANTS Motion to Bifurcate and will try interpretation of contract, liability and unclear hands defense issues as a bench trial [¶] If the Court determines the interpretation of contract in favor of plaintiff then trial as to liability issue will go forward as a bench trial and then on to the damages phase as a jury trial.”

appeared to be based on false statements. The court concluded that Goldic failed to carry its burden of establishing the parties intended “degrade” to mean what Goldic alleged. The court concluded there was no breach.

Goldic objected to the court’s tentative decision, suggesting that Goldic had not introduced other [unspecified] statements Maxmile had made that violated the settlement agreement but which were not “relevant to the narrow issue of contract interpretation,” and this evidence “remain[ed] a matter for the jury.” Moreover, Goldic did not agree that the flyer was entirely accurate. Maxmile pointed out that Goldic failed to offer any evidence at trial that any part of the Maxmile flyer was inaccurate.

The trial court stated it had reviewed Goldic’s statements of controverted issues and objections and “determined that the Tentative Decision adequately dealt with all controverted issues.” The court issued the tentative decision as its Statement of Decision on March 20, 2007. As in the tentative decision, the court determined that Goldic failed to prove that the parties intended, by using the term “degrade’ in the settlement agreement, to “prohibit publications, broadcasts, advertisements or communications which are true, but reflect badly on Goldic’s products[.]” Goldic therefore could not establish a breach of the settlement agreement, thus disposing of the breach of contract claim and the entire action.

Judgment for Maxmile and Hwang was entered on May 2, 2007. This timely appeal followed.

II

DISCUSSION

Contract interpretation is a question of law unless extrinsic evidence introduced to resolve an ambiguity is in conflict. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166; *see Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [“interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation] is essentially a judicial function to be exercised according to the generally accepted canons of interpretation”].) “[W]hen no parol evidence is introduced

(requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing.” (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1166, citing *Parsons v. Bristol Development Co., supra*, 62 Cal.2d at p. 865.) Extrinsic evidence is not admissible to ascribe a meaning to an agreement to which it is not reasonably susceptible. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.)

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.]” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811.) “Every contract requires the mutual assent or consent of the parties. (Civ. Code, §§ 1550, 1565.) The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved.” (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943.)

“‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.* § 1639.)’” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) “[E]vidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language.” (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1166 and fn. 3.) We consider the document as a whole, not just an individual clause (Civ. Code, § 1641) and interpret the words in their “ordinary and popular sense” unless a different meaning was mutually intended, with the aim of avoiding absurd results. (Civ. Code, § 1644; *Transamerica Ins. Co. v. Sayble* (1987) 193 Cal.App.3d 1562, 1566; *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) “Extrinsic evidence is ‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’” (*Parsons v. Bristol Development Co., supra*, 62 Cal.2d at p. 865.)

A. By Its Terms, the Settlement Agreement Does Not Prohibit True But Derogatory Statements

The court must interpret the settlement agreement as a whole, in the particular circumstances of the case. (*MacKinnon v. Truck Ins. Exchange, supra*, 31 Cal.4th at p. 648 [contract language cannot be found to be ambiguous in the abstract].) Here, the settlement agreement not only identifies the underlying lawsuit, but incorporates its allegations by reference. The agreement compromised, settled and mutually released “any and all claims arising out of or related to any acts of DEFENDANTS relating to the alleged slander, libel, negligence and interference with business relations, that allegedly occurred prior to the execution of this Agreement, whether or not related to or connected with the Action. . . .” The parties expressly warranted that “they [did] not rely on any statement, representation, legal opinion, or promise of any other party in executing this agreement or in making the settlement . . . , except as expressly stated in this Agreement[.]” And, as discussed above, the parties agreed to refrain from any future publications, broadcasts, advertisements or communications which “defame, libel, slander or degrade . . . any of the other party’s products.” Defendants, in a separate provision, agreed to refrain from any publications, broadcasts, advertisements or communications in the future which “defame, libel, slander or degrade plaintiffs or any of plaintiffs’ products, or constitute a violation of any case law or any statute or code.” Defendants expressed regret that their prior advertisements or broadcasts “may have caused an *inaccurate* impression about the quality and place of manufacturing of plaintiffs’ products and/or the financial condition of plaintiffs.” (Emphasis added.) Nothing in the settlement agreement expressly prohibits or even mentions a commitment to refrain from making true (albeit unflattering) statements.

B. By Expressly Incorporating the Allegations Contained in the Underlying Complaint Into the Settlement Agreement, the Parties Provided the Necessary Context for Interpreting the Term “Degrade”

Although the word “degrade” is not defined in the settlement agreement, the parties provided sufficient guidance for interpreting their intentions by incorporating Goldic’s allegations into the settlement agreement. Goldic alleged in its underlying complaint that an advertisement published in the China Daily News in October 1996 “without justification or privilege, *falsely*, wrongfully, and erroneously criticized and attacked [Goldic’s] Dictionary[.]” (Emphasis added.) Goldic alleged the advertisement stated that Goldic’s dictionary “had serious problems in that the pronunciation and interpretation were wrong; that it malfunctioned, and over 588 mistakes were found to exist in its operations. Also, it was stated within said advertisement that the sequence of Chinese words given by said Dictionary were incorrect and misleading; the others had complained about said Dictionary, resulting in an overloading of work and a high rate of return . . . ; that [Goldic’s] stock had dropped due to poor quality and operational problems, causing a cash flow problem; that [Goldic] refused to recall same, and also failed to notify the public about these problems.” The advertisement urged customers to “wake up,” indicating that “the era when the bad coin is replaced by the good coin – has come,” which implied that customers should replace their Goldic dictionary with one of Maxmile’s. Goldic charged that the advertisement was false, libelous, and derogatory.

The second cause of action for trade libel was based on the same advertisement and alleged that the statements disparaged Goldic’s dictionary “in that Defendants *falsely* assert, inter alia, that [Goldic’s] product is defective, malfunctions, is unreliable, and also is inferior and substandard to others, including Defendants’ own products.” (Emphasis added.) The third cause of action for libel was based on two newspaper advertisements in October and December 1996. Although these advertisements did not mention Goldic by name, there were only three brand name electronic Chinese dictionaries on the market. As defendants manufactured two of them, readers readily understood the implication that

Goldic's dictionaries were the ones lacking in quality. Goldic alleged that these statements were false.

Goldic based its cause of action for slander per se on statements Roger Hwang made during a radio broadcast in September 1996. Goldic alleged those statements were false. Similarly, in the causes of action for negligent and intentional interference with prospective economic advantage, Goldic alleged defendants' advertisements and radio broadcasts contained false and erroneous information. In the unfair competition cause of action, Goldic alleged defendants' business practices were unlawful, unfair, or fraudulent, and constituted false advertising. Goldic charged defendants with unlawful restraint of trade in that defendants engaged in wrongful conduct, including the advertisements, radio broadcasts, sales tactics, and "other actions herein," with the intent to monopolize and restrain free translation in the very small market of Chinese translation dictionaries. Finally, Goldic alleged defendants breached the legal duty defendants owed Goldic by, among other things, "making erroneous and false representations" and failing to investigate their claims sufficiently before making them. In sum, nowhere in the complaint did Goldic allege defendants' statements were anything *but* false. These allegations thus refute Goldic's argument that the parties meant to prohibit statements regardless of their falsity.

C. Under the Circumstances, Importing the Dictionary Definition of the Term "Degrade" Violates the Rules of Contract Interpretation

Notwithstanding the consistent references to false statements throughout the underlying complaint, Goldic urges the court to look outside the settlement agreement and adopt dictionary definitions of the word "degrade." Goldic quotes the Merriam-Webster Online Dictionary definition of degrade: "to bring to low esteem or into disrepute." Similarly, the Random House Webster's College Dictionary defines "degrade" as "to lower in dignity or estimation; bring into contempt. 2. to lower in character or quality; debase." Goldic further notes that "degrade" is a synonym of "disparage." Neither definition mentions truth or falsity.

Dictionary definitions are often useful, of course. (*MacKinnon v. Truck Ins. Exchange, supra*, 31 Cal.4th at p. 649.)⁵ That said, “such examination does not necessarily yield the ‘ordinary and popular’ sense of the word if it disregards the [contract’s] context.” (*Ibid.*) Given the parties’ express incorporation of the underlying complaint with its unambiguous allegations that Maxmile’s advertisements and statements were false, we can ascertain the parties’ intentions from the settlement agreement alone. (Civ. Code, §§ 1638, 1639, 1647.) As a result, isolating the word “degrade” from the context of the entire agreement, as Goldic requests, is unwarranted and improper here.

Goldic asserted a cause of action for trade libel in the underlying complaint and in the instant action, alleging that Maxmile’s statements were false. In the trade context, “disparagement” requires a falsehood to be actionable. (*See Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035 [““‘Injurious falsehood, or disparagement . . . may consist of the publication of matter derogatory to the plaintiff’s title to his property, or its quality, or to his business in general’” [Citation.]” (Italics omitted.)]; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 647, p. 954 [“To be actionable, the disparaging statement must be untrue”]; Masterson et al., Cal. Civil Practice Business Litigation (The Rutter Group 2008), ¶ 65:13 [“The plaintiff must plead and prove that the statement is false. . . . A statement which is true . . . does not give rise to a cause of action”].) Goldic’s assertion that “[p]er their plain meaning and dictionary definitions, neither term [degrade or disparage] requires the negative statement to be false” is beside the point. In fact, the definition of trade disparagement is the “common-law tort of belittling someone’s business, goods, or services with a remark that is false or misleading but not necessarily defamatory.” (Black’s Law Dict. (8th ed. 2004) p. 1530.) As we can (and must) interpret the settlement agreement so as to give effect to the parties’ mutual intentions as of the time they entered the agreement, and those

⁵ Goldic concedes dictionary definitions are not binding on the court.

intentions are unambiguous, we conclude the parties did not intend to prohibit true but unflattering statements. Goldic cannot establish a breach of the settlement agreement.

D. No Issues Remained For the Jury to Decide

Goldic contends that, even accepting the trial court's narrow definition of "degrade" as requiring an element of falsity, there *were* false statements in Maxmile's flyer and that these statements should have gone to the jury. To begin with, Goldic's counsel agreed on the record with the trial court's statement that interpretation of the word "degrade" would determine whether the case would go to the jury. Goldic's suggestion that it held back some (unspecified) evidence concerning the falsity of statements in the Maxmile flyer is not a ground for reversal. If in fact there was additional evidence that Goldic elected not to offer, that was a strategic decision for which it must take responsibility.

Additionally, we reject Goldic's rather transparent effort to revive its dismissed defamation causes of action. The record is unequivocal that Goldic does not dispute the accuracy of any of the assertions regarding its dictionary's translation errors, only Maxmile's opinion as to the meaning of such errors (that is, that errors mislead children and hurt business). Again, Goldic evidently made at least a strategic determination before trial that proving Maxmile's opinions were false was not a promising gambit. Thus, the only basis for proceeding with the jury portion of the case would be if the trial court had determined that the admittedly true statements were actionable under the settlement agreement. Our conclusion that the trial court did not err in ruling that the settlement agreement prohibited only false statements leaves nothing for a jury to decide. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs of appeal.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.